No. 226

In the Supreme Court of the United States

OCTOBER TERM, 1944

REPUBLIC AVIATION CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below (R. 710–715) is reported in 142 F. (2d) 657. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 673–679, 627–654) are reported in 51 N. L. R. B. 1186.

JURISDICTION

The decree of the court below was entered on April 6, 1944 (R. 716–718). The petition for a writ of certiorari was granted on October 9, 1944 (R. 718). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code,

as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board could properly find that petitioner, by promulgating and enforcing a rule which prohibited employees from soliciting union membership in the plant during non-working time, interfered with the exercise of the rights guaranteed employees under Section 7 of the Act, in violation of Section 8 (1).

2. Whether, at a time when the majority of its employees had not designated any union as a collective bargaining representative, petitioner violated Section 8 (1) of the Act in forbidding the wearing of union "shop steward" buttons in the plant by employees who were shop stewards of a union then organizing its employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 54–55.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board issued its findings of fact, conclusions of law, and order (R. 673–679, 627–654).[1] Briefly summarized, the facts, as found by the

[1] Except as noted in its decision, the Board adopted, without restating them, the findings, conclusions, and recommen-

Board and as shown by the evidence, are as follows:[2]

Petitioner, a manufacturer of military aircraft, operates a plant in Babylon Township, Suffolk County on Long Island, New York (R. 629, 639, n. 14; 11–12, 16), the only plant here involved. This plant is not in or near any city (R. 639, n. 14; 447, cf. 66, 105, 146); the employees live at distances ranging from as much as 10 to 50 miles from the plant (R. 638; 195, 257, 591, 593, 605); their homes are scattered over a wide area (R. 638, 639, n. 14; 412, 421, 430, 479, 497, 540, 591, 593, 595, 597, 599, 601, 603, 605, 626).[3] The plant is solely engaged in the production of materials for war and during 1942 and 1943 was expanding with extreme rapidity (R. 638, 639, n. 14; 12, 41, 48, 541, 543). Most, if not all, of the employees have their

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dations of the Trial Examiner who conducted the hearing (R. 674). Accordingly, whenever reference is hereinafter made to the Board's findings, such reference is to findings that the Board itself formulated or to findings of the Trial Examiner that the Board adopted. See pp. 10, n. 12, 40–41, *infra*.

[2] In the following statement, the references preceding semicolons are to the Board's findings and succeeding references are to the supporting evidence.

[3] The record discloses the names of the communities in which various of the employees live; reference to any map of Long Island and New York establishes the distances of each of these communities from the plant and also demonstrates that the communities are scattered over a wide area. The record discloses that many employees use the railroads in coming to and from work (R. 66, 105, 146). The distances which employees using the railroad must travel daily can be judicially noticed from a map.

lunch at the plant (R. 638; 55, 56, 72–73, 90, 119, 167, 187, 193–194, 466), at which they work long hours (R. 638, 639, n. 14; 72, 105–107, 132, 147, 261).[4] Due to gas rationing the normal peacetime use of the automobile is drastically reduced and transportation to the vicinity of the plant is difficult (R. 638, 639, n. 14; 26, 66, 105, 146, 194, 195).

The Union[5] began organizing petitioner's employees during 1942 (R. 630; 101–102, 138), but it did not come out into the open until early in January 1943, when it began distributing literature outside the plant (R. 630; 66, 102, 138–139, 176, 183, 206), soliciting membership applications (R. 630; 66, 82–83, 90–94, 132, 138–141), and holding meetings (R. 630; 66, 102, 132, 183, 210, 237). On January 13, 1943, the Union held a meeting at which employees Stone, Katz, Bobrow, Kahler and Rosenkrantz were designated shop stewards (R. 630; 64–66, 102, 154, 183, 237). The next day, Stone, Katz and Rosenkrantz began to wear in

[4] Although the record for security reasons (R. 388) does not reveal the number of employees at this plant, the number employed there at the time of the Board's hearing in April 1943 must have been very large (R. 45, 61, 98, 166, 210, 231, 248–249, 326, 388, 428, 505, 541). The plant was referred to as "huge" (R. 170) and as employing "thousands" (R. 46, 388). There is testimony that its employment had increased 70 or 80 times since 1939 (R. 541) and that in one department alone, Shop 10, about 1,000 persons were employed on the day shift (R. 166).

[5] International Union, United Automobile, Aircraft & Agricultural Workers of America, UAW–CIO, the union that filed the charges on which the Board issued the complaint (R. 1–3).

the plant buttons which bore the legend: "UAW–CIO Steward" (R. 631; 67, 103, 113, 134, 154; Bd. Exh. 15).[6]

On January 15, 1943 Stone passed out union application cards in the plant during the lunch period (R. 633; 283, 343). Supervisor Bofinger summoned Stone to his office after the lunch hour, and called Stone's attention to the rule against solicitation (R. 633; 70–71, 88–89, 284). This rule had been in force since March, 1941 and was printed in a handbook given all employees (R. 632, n. 4, 634; 38–41, 50). It stated that "Solicitation of any type cannot be permitted in the factory or offices" (R. 632; Pet. Exh. 1, R. 39–40). Bofinger warned Stone that he would be discharged if he continued to violate the rule (R. 633; 70–71, 88–89, 283–284, 345, 359).[7] Stone replied that his union activities were protected by

[6] Prior to this time no union buttons of any kind had been worn by petitioner's employees (R. 81, 132, 134, 137, 343–344).

[7] On other occasions during the week preceding this warning, Stone had also solicited membership for the Union in the plant outside working hours, and his union activities had come to the attention of the management (R. 632; 90, 276–278, 313–315, 319–323, 326, 361). Supervisor Bofinger, on learning of Stone's union activities, conveyed the information to his supervisors and, though told by Superintendent Wilson that Stone by soliciting in the plant was violating the plant rule, Bofinger did not at this time order Stone to desist but instructed Stone's foreman to observe and report Stone's union activity to him (R. 632; 276–278, 313–315, 319–321, 325–326). The foreman carried out these instructions, giving Bofinger reports almost daily, which Bofinger passed on to his superior (R. 632; 278, 321–323, 325).

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the Act and that he would continue them (R. 633; 71, 72, 89–90, 284). Immediately after giving Stone this warning, Bofinger prepared a request for Stone's release (R. 633; 288, 297, 359). Factory Manager Lasker refused, however, to approve Stone's release at this time but instructed Bofinger to observe personally whether Stone would again solicit in the plant (R. 633; 288–289, 298, 359, 375). Stone continued soliciting on his own time (R. 633; 72–73, 90, 92, 289–290). On January 20, Bofinger saw Stone solicit membership for the Union during the lunch hour and forthwith discharged him (R. 634; 92, 291).[8]

On January 22, Rosenkrantz, who had been wearing his union steward button since January 14, was interviewed by Kress, the assistant to petitioner's president, and by other management officials who told him that the wearing of a steward button in the plant was forbidden (R. 631, n. 3, 646–647; 154, 556–559). Rosenkrantz thereupon removed his button and promised to cease wearing it (R. 631, n. 3, 646–647; 558–559). Later, that same day, Katz, who likewise had worn his union steward button since January 14, was summoned to a meeting of management officials in petitioner's office building (R. 643; 120, 559). At this meeting both the solicitation of

[8] Bofinger had been authorized by Lasker to discharge Stone if he personally saw Stone solicit in the plant (R. 633–634; 288–289, 291, 375–376, 406–407, 552).

union members on company property and the wearing of steward's buttons was discussed (R. 643; 121–123, 561). Kress told Katz that petitioner had no objection to its employees talking about the Union, but that the rule forbade their asking anyone to join it (R. 121, 559–560).[9] Kress further told Katz that wearing a steward button, absent recognition by petitioner of the Union as the representative of the employees, amounted to a misrepresentation of existing facts and asked Katz to remove his button (R. 643; 122, 561). Katz replied that he questioned Kress' statement but that he would remove the button until he had an opportunity to satisfy himself as to his "right" to wear it, and that, if he found that he was within his rights in doing so, would resume it (R. 643; 122, 561).[10] That night Katz discussed the question with the Union and became con-

[9] Kress interpreted petitioner's rules as permitting conversation about the Union even while employees were on the job so long as their discussion did not interfere with production (R. 122, 556, 559–560, 568). Katz told Kress that the prohibition against solicitation of union membership on company premises would make it impossible to organize a union (R. 121).

[10] Katz on this occasion also explained to Kress his understanding that as a steward in an unorganized plant his duties consisted chiefly of organizing the employees (R. 122). Katz testified that he understood that in an unorganized plant as opposed to an organized plant the steward's duties were mainly those of an organizer (R. 103, 154–156, 168, 171–173, 175), and that he so explained to the employees in the plant (R. 156). Stone and Bobrow gave similar testimony (R. 66, 191, 214–220).

vinced that he had a right to wear a steward button (R. 643–644; 123). The next day he wore the button and was discharged pursuant to Lasker's instructions (R. 644; 123).

On January 25 Bobrow began to wear his steward button to work and on January 26 Kahler appeared at work wearing his steward button (R. 644; 183–184, 209, 226, 237). On January 26, Bobrow and Kahler conferred with Kress and other management officials concerning the discharges of Stone and Katz, petitioner's rules against solicitation and the wearing of steward buttons in the plant (R. 645; 187, 189, 238–239). At this conference, Kress reaffirmed petitioner's position on these matters (R. 645–646; 188–198, 239–242, 562–566). With respect to steward buttons, Kress stated that "with all the developments in labor organization in recent years, that a steward had gotten to certain pretty definitely and clearly defined functions and responsibilities in the operation of a union agreement, and that since there was no union agreement that obviously they could not have those duties and responsibilities" in petitioner's plant; that petitioner looked "on the wearing of steward buttons as a misrepresentation;" that for all we knew there might be other organizations trying to organize our employees; that if we permitted them to wear a steward's but-

[11] Bobrow replied that he "thought the company was a little bit naive on this question because unfortunately the workers knew only too well that this was not a union shop" (R. 192).

ion these other organizations might come back and want the same right" (R. 645; 564). Lasker warned Bobrow and Kahler who had on their union steward buttons that if they persisted in wearing such buttons in the plant they would be discharged (R. 646; 198, 235, 241–242, 565). They continued, however, to wear their buttons and were discharged about an hour after the meeting (R. 646; 198–199, 242).

Upon the foregoing facts, the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act. Respecting the no-solicitation rule, the Board found that in view of the conditions under which the employees worked and lived, the gas shortage and resulting transportation difficulties, the plant was "the natural place for workers to talk to one another and to persuade one another to join the union" (R. 638). The Board found that the rule "entirely deprived them of their normal right to 'full freedom of association' in the plant on their own time, the very time and place uniquely appropriate and almost solely available to them therefor" (R. 638). It further found that the rule under these circumstances "operates to render the beneficient purposes of the Act substantially impossible of achievement" (R. 639). The Board pointed out that petitioner had not shown that such a rule was necessary in maintaining production or discipline either by proof

"of special circumstances" or by reasons "warranting extension of the prohibition to non-working time, when production and efficiency could not normally be affected by union activity" (R. 674). It therefore held that this prohibition violated Section 8 (1) of the Act (R. 674–675).

Respecting the prohibition against wearing steward buttons in the plant, the Board stated that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity" (R. 676), and that, contrary to the belief that actuated petitioner in forbidding the practice, union steward buttons do not imply either that the employer has contractual relations with, or favors, the union (R. 675–676). It therefore held that by adopting and enforcing this prohibition petitioner violated Section 8 (1) of the Act (R. 676).

The Board concluded that by discharging the four employees for engaging in union activities which it unlawfully forbade petitioner violated Section 8 (3) of the Act.[12] The Board also found

[12] The Board reversed the Trial Examiner's finding (R. 634–637) that the "no-solicitation" rule had been discriminatorily applied to Stone, but it sustained his finding (R. 637–639) that the discharge of Stone was in violation of Section 8 (3) because, in the circumstances of the instant case, petitioner's "no-solicitation" rule itself violated Section 8 (1) of the Act (R. 674–675). The Board likewise reversed the Trial Examiner's finding (R. 647) that petitioner's prohibition upon the wearing of steward buttons was motivated by anti-

that petitioner had engaged in interference in violation of Section 8 (1) of the Act in certain other respects (R. 677), not here in issue (Pet. Br., p. 2, n. 1).

To remedy the foregoing unfair labor practices, the Board ordered petitioner to cease and desist from its violations of the Act, to reinstate with back pay the four men discharged, to rescind the rule against solicitation insofar as it prohibits union activity and solicitation on company property during the employees' own time, and to post appropriate notices (R. 678–679). On March 22, 1944, the Circuit Court of Appeals for the Second Circuit held, one judge dissenting in part, that the Board's order should be enforced (R. 710–714, 714–715). On April 6, 1944, it entered a decree accordingly (R. 716–718).

SUMMARY OF ARGUMENT

I

The discharge of employee Stone as a penalty for soliciting union members in the plant during the lunch hour was violative of Section 8 (3) and (1) of the Act unless petitioner was privileged to prohibit its employees from engaging in such activities. Petitioner's rule prohibiting union

union animus, but sustained his finding (R. 649) that the discharges were violative of Section 8 (3) because, in the circumstances of this case, the prohibition violated Section 8 (1) of the Act regardless of the motive which induced its adoption (R. 675–676).

solicitation in the plant during non-working time was itself violative of Section 8 (1) and consequently could not justify the discharge. Employees are not deprived of their rights of self-organization upon entering the employer's property. Although the protection against employer interference which is accorded to those rights by Section 8 (1) of the Act is literally absolute, the Board has sought to harmonize the legitimate proprietary interests of employers with the statutory interests of the employees by holding that employers may properly prohibit union solicitation during working time, but that, in the absence of special circumstances, they may not prohibit solicitation during non-working time, since normally such activities could not adversely affect legitimate employer interests.

The Board recognizes that, while normally union solicitation during non-working time does not adversely affect legitimate employer interests, special circumstances may exist in a particular plant because of which union solicitation, even during non-working time, might be detrimental to production or discipline. In such cases the Board balances the necessity of permitting solicitation to enable the employees to exercise their rights under the Act against the injury to the employer which such solicitation would impose, and determines whether the interests of employees or of the employer should give way.

The Board viewed the instant case in the light of its general policy. It found that under the circumstances here present, enforcement of the no-solicitation rule would make it virtually impossible for petitioner's employees to exercise the rights guaranteed them by the statute. It found that to permit union solicitation on non-working time would, since no special circumstances whatever were shown, impose little, if any detriment upon petitioner's legitimate interests. The Board therefore concluded that the rule, insofar as it prohibited union solicitation during non-working hours was an unreasonable interference with the statutory rights of the employees and, as such, violated Section 8 (1) of the Act.

II

The discharge of employees Katz, Bobrow and Kahler as a penalty for wearing union steward buttons in the plant was violative of Section 8 (3) and (1) of the Act. The rights guaranteed in Section 7 include the right of employees to wear in the plant as elsewhere buttons indicating their membership or position in a labor organization. Petitioner does not challenge the proposition that a shop steward, like any other officer, is entitled to wear a button indicating his position in the union. Petitioner contends, however, that the characteristic function of a shop steward is to deal with management as a representative of em-

ployees, and argues that the wearing of a steward button necessarily implies that management maintains contractual relations with the union. But the function and status of a shop steward depends on the organization in which he functions, the stage of development of the organization and the nature of relations between the organization and management. Appointment of shop stewards prior to the designation of the union as exclusive bargaining representative or establishment of collective bargaining relationships is a common practice. The position of Katz, Bobrow and Kahler as stewards of the Union organizing petitioner's employees was in no way inconsistent with the general understanding of a steward's functions. On the basis of the record in this case as well as its experience the Board found that the wearing of "steward" buttons did not constitute a representation that petitioner either approved or recognized the union, and that it was unreasonable to assume that the employees would be misled by the wearing of such buttons.

ARGUMENT

I

The Board properly found that application of petitioner's "no-solicitation" rule to prevent union solicitation by employees on non-working time interfered with the exercise of rights guaranteed in Section 7 and violated Section 8 (1) of the Act

It is undisputed that petitioner discharged employee Stone as a penalty for soliciting members

for the Union in the plant during the lunch period. This discharge, like the suspensions in the *Le Tourneau* case (No. 452, this Term, Bd. Br., p. 12), was an unfair labor practice under Section 8 (3) of the Act, unless petitioner was privileged to prohibit its employees from engaging in such activities.[13] The Board found that

[13] Petitioner's contention that the discharge of Stone could not be deemed violative of Section 8 (3) even if the rule were invalid (Br., pp. 27–28) rests upon a misconception of the meaning of the term "discrimination" as used in Section 8 (3). Petitioner asserts that the term "plainly means the making of a difference in treatment of one or more individuals as compared to others", and argues that since it treated solicitors for all causes alike its discharge of Stone did not meet that test. But clearly Stone was discharged for engaging in a lawful union activity. The Board has uniformly and consistently held that the prohibition of discrimination "forbids the employer to affect or change an employment relationship because of the employee's union membership or activity." National Labor Relations Board, *Third Annual Report* (Govt. Print. Off., 1939), p. 81; *Matter of Botany Worsted Mills*, 4 N. L. R. B. 292, 300–304, enforced, 160 F. (2d) 263, 268–269 (C. C. A. 3). If there is a casual connection between an employee's union activity and his discharge the discharge is discriminatory within the meaning of Section 8 (3). *National Labor Relations Board* v. *Arcade-Sunshine Co.*, 118 F. (2d) 49, 51 (App. D. C.), certiorari denied, 313 U. S. 567. Whether an employer who discriminates in this sense also differentiates among employees is wholly irrelevant. On petitioner's theory an employer who discharged an employee for joining a union would be beyond the reach of Section 8 (3), if only it were the employer's policy to discharge all employees who joined social, religious or political as well as labor organizations. The courts have recognized that a discharge is violative of Section 8 (3) whenever its purpose or effect is to discourage union activities protected by the Act. *National Labor Relations Board* v.

under the circumstances of this case petitioner's rule, insofar as it prohibited union solicitation in the plant on non-working time, was itself violative of Section 8 (1) of the Act and therefore, afforded no defense to the discrimination practiced against Stone.

In our brief in the *Le Tourneau* case, pp. 19–21, 34–39, we have argued that employees do not, by entering upon the employer's property, lose the rights of self-organization which the Act guarantees. The literally absolute prohibition upon employer interference with the exercise of those rights which is contained in Section 8 (1) of the Act is as applicable to interference accomplished by virtue of an employer's control over his property as it is to interference which stems from other aspects of the employer's control over the employment relation. Since, as we have shown (*Le Tourneau* brief, pp. 21–23, 35–36), an employer violates Section 8 (1) of the Act whenever he engages in conduct which tends to interfere with the free exercise of self-organizational rights regardless of his motive in doing so, it is apparent that plant rules which inhibit solicitation of union members fall within the literal language of the Act.

Peter Cailler Kohler Swiss Chocolates Co., 130 F. (2d) 503, 506 (C. C. A. 2); *National Labor Relations Board* v. *Good Coal Co.*, 110 F. (2d) 501, 505 (C. C. A. 6), certiorari denied, 310 U. S. 630. See also cases cited in our brief in the *Le Tourneau* case, pp. 12, 23–24.

But this does not mean that the statute precludes all recognition of competing legitimate interests of employers any more than the constitutional guarantee of freedom of speech precludes recognition of competing legitimate interests of the community as a whole. Just as the public streets are not primarily forums for the dissemination of information, so manufacturing plants are not primarily forums for solicitation of membership in labor organizations. Therefore, although neither activity may be completely curtailed, insofar as the one may interfere with the convenience of pedestrians, and the other with efficient production, both are subject to modification. Compare *Jamison* v. *Texas,* 318 U. S. 413, 415–416; *Hague* v. *C. I. O.,* 307 U. S. 496, 514–516; *Thornhill* v. *Alabama,* 310 U. S. 88, 105–106; *Valentine* v. *Chrestensen,* 316 U. S. 52, 53; *Schneider* v. *State,* 308 U. S. 147, 162–163; *Cantwell* v. *Connecticut,* 310 U. S. 296, 304; and *Martin* v. *Struthers,* 319 U. S. 141, 143, with *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 198–200.

Determination of the extent and manner in which modification of the rights of employees should be permitted in the light of conflicting employer interests, involving, as it does, appraisal of the nature and importance of the interests of both groups in relation to public policy and of the impact of measures adopted by employers to

protect their interests upon effectuation of the statutory policies, is a function which the Board by virtue of its specialized knowledge and experience in the field of labor relations is peculiarly well qualified to perform."

Resolving such questions "belongs to the usual administrative routine of the Board." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130. This the court below properly recognized; it acknowledged the Board's power to draw upon experience gained in administration of the statute and upon its "general familiarity with the conditions of industry" (R. 713) in formulating broad principles applicable to the numerous cases involving employer attempts to curtail union solicitation on plant premises.

A. The Board's policy

In 1943, after extensive experience with the problems presented by union solicitation on plant premises, the Board formulated a general policy "designed to protect the rights of employees under the Act, but at the same time to discourage need-

[14] Cf. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 684; *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 704–706; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 89, 92; *Gray* v. *Powell*, 314 U. S. 402, 412–413.

less interference with the uninterrupted production so vital under present wartime conditions."[14] A statement by the Board respecting this general policy "of which its order here was a particular application" (*Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 92), is set forth in its Eighth Annual Report:[15]

> A number of cases which came before the Board during the fiscal year 1943 involved the question of whether and to what extent an employer may prohibit or limit union solicitation or other activity on company time or property. The fact that the problem thus appeared and reappeared indicated that it was of general interest, and the Board therefore felt it wise to evolve a clear and general policy for the guidance of employers and labor organizations alike. The Board's policy was stated in *Matter of Peyton Packing Company*, 49 N. L. R. B. 838, as follows:
>
> "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must

[14] National Labor Relations Board, *Eighth Annual Report* (Gov't Print. Off., 1944), p. 29.

[15] *Idem.*

be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." * * * Since the decision in the *Peyton Packing* case, the Board has in general followed the rule there announced that an employer may properly prohibit union activities during working time, but not during the employees' own time even though they are on company property.

Although petitioner alleges (Br., p. 22) that the Board has been inconsistent in its position, this is not the case. As early as March 18, 1939, the Board in *Matter of Midland Steel Products Co.*, 11 N. L. R. B. 1214, 1223, enforcement denied, 113 F. (2d) 800, 805-806 (C. C. A. 6), said: "We have grave doubts that the solicitation of union members on an employer's property by an employee

on his own time is subject to lawful prohibition by an employer." Likewise, the Board has never departed from the view expressed in *Matter of Botany Worsted Mills*, 4 N. L. R. B. 292, 303, enforced 106 F. (2d) 263–269 (C. C. A. 3), that a "rule prohibiting outside activities during working hours [is] in itself unobjectionable. * * *" The three cases cited by petitioner (Br., p. 22, n. 20) are in accord with these principles.[17]

The distinction between working and non-working time, thus drawn by the Board, was foreshadowed during the legislative debates on the Act.[18]

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[17] The facts of the *Nash-Kelvinator* and *Marshall Field* cases are set forth at pages 28, 30, *infra*. In each it was shown that a non-solicitation rule was necessary to protect the operation of the business or to prevent disorder, circumstances which the Board's statement of general policy expressly takes into account. In the third case (*Matter of Bemis Bros. Bag Co.*, 28 N. L. R. B. 430, 440), the trial examiner's report showed that the employee in question had admittedly been soliciting during working hours. Inasmuch as the validity of the company's rule against solicitation was not in issue, the Board's report treats the matter cursorily and does not explicitly state when the solicitation occurred. But the case obviously must be read in the light of its facts.

[18] 79 Cong. Rec. 7675–7676, 74th Cong., 1st Sess., May 16, 1935:

Mr. HASTINGS. Referring to section 7, which has been read to the Senate several times by the Senator from Maryland [Mr. TYDINGS], does the Senator from New York understand that that section would permit employees to do all these things *during working hours?*

* * * * * * *

Mr. WAGNER. May what be done *during working hours?*

Mr. HASTINGS. The various things mentioned in section 7. It states that—

1. *The employees' interest.*—The Board's conclusions rest upon sound considerations of industrial practice and policy. Personnel management in this country uniformly recognizes the wisdom of granting employees freedom to enjoy normal social intercourse with each other on their employer's premises. Watkins & Dodd, *The Management of Labor Relations* (1938), p. 106; Kreps,

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"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining" and so forth.

Mr. WAGNER. The Senator asks whether these things may be done *during working hours?*

Mr. HASTINGS. Yes.

Mr. WAGNER. Of course, if employees did that *when they should be working*, they would be subject to discharge.

Mr. HASTINGS. If they did that *during working hours* and in consequence were discharged, would not the employer be guilty of an unfair labor practice? I ask that because section 8, paragraph (*1*), says that—

"It shall be an unfair labor practice for an employer (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Mr. WAGNER. No sensible person would interpret that language to mean that while a factory is at work the workers could suddenly stop their duties to have a mass meeting in the plant on the question of organization.

Mr. HASTINGS. The Senator does not think the language is subject to that construction.

Mr. WAGNER. Why, of course not.

Mr. HASTINGS. I desired to be certain that the RECORD would be clear upon that point.

Mr. WAGNER. The RECORD may be clear upon that point. [Italics added.]

A. L., *Foremanship Fundamentals* (1942), p. 250. It was on this premise that the Board, in *Matter of Tomlinson of High Point*, 58 N. L. R. B., No. 188, expressly noted that rules prohibiting union solicitation during non-working time constituted a serious impediment to the exercise of the rights of self-organization. The Board said:

> Normally, the plant and its premises are the only place in which all the employees congregate, and hence may afford the only practicable opportunity for the initial steps by which self-organization is effected.

Employer practices which to the employees appear unfair often arouse immediate resentment; methods of redress, perhaps through self-organization, will inevitably be discussed during lunch hours and rest periods, the earliest opportunities following the occurrence of the grievance, in which the employees are able to get together and talk freely. In view of the nature of the subject matter and the availability of the public to be reached (cf. *Bakery & Pastry Drivers & Helpers* v. *Wohl*, 315 U. S. 769, 775), plant premises during non-working hours are "natural and proper places for the dissemination of information and opinion"[19] concerning self-organization.

Unions in recent years have continued the historic practice of using the daily social contacts occurring on the employer's premises to further

[19] *Schneider* v. *State*, 308 U. S. 147, 163.

organization.[20] The necessity and importance of utilizing the plant as a place in which to contact fellow employees have been increased since house to house canvassing, one of the most effective of union proselytizing techniques,[21] has been rendered difficult if not impossible by the fact that—[22]

> Crowded housing facilities in war production areas usually imply long journeys to and from the job for many workers. In several areas according to reports, substantial numbers of workers are commuting distances up to and in excess of 60 miles. The effect of this is to add 2, 3 or more hours to the employees' workday.

And, as the Board has pointed out, the present day factors "of rapid plant expansion and turn-

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[20] C. F. W. A. *Shop Steward's Manual*, issued by United Federal Workers of America, C. I. O., p. 6; Thomas, R. J., *Automobile Unionism*; Report to the 1941 Convention of the U. A. W. C. I. O., p. 14; New Orleans C. I. O. Industrial Union Council, Feb. 1942, *How to Build Your Union*, p. 15; Lincoln, Jonathan Thayer, *The City of the Dinner Pail* (New York, 1900), p. 134.

[21] See *Martin* v. *Struthers*, 319 U. S. 141, 145–146; *Schneider* v. *State*, 308 U. S. 147, 164; Lorwin and Flexner, *The American Federation of Labor* (1933), 352; International Ladies Garment Workers Union, *Handbook of Trade Union Methods* (1937), p. 10; Brooks, Robert, R. R., *When Labor Organizes* (1938), Chap. I ("Organizing a Union").

[22] Evans, Duane, *Problem of Absenteeism in Relation to War Production*, U. S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review, January 1943, p. 6; Kennedy, Eleanor V., *Absenteeism in Commercial Shipyards*, United States Department of Labor, Bureau of Labor Statistics, Bull. No. 734 (1943); Thomas, R. J., *Housing for Defense* (1942), p. 16.

over of personnel," increase the likelihood that the plant and its premises alone afford adequate avenues for the communication of self organizational information to and between employees. *Matter of Tomlinson of High Point, Inc.*, 58 N. L. R. B., No. 188.

The Board's conclusions accord with those reached by the National War Labor Board. In its decision in the leading case, *Matter of General Chemical Co.*, 3 War Lab. Rep. 387, 396, Public Member Wayne Morse, speaking for a unanimous Board, said:

> It is the opinion of the Board that the recommendation of the panel on union activity should be modified to read that no soliciting of members or other union activities shall be carried on by any employee or by any representative of the union during working hours. The Board has observed the workings of the provisions on union activity of many collective bargaining agreements which attempt in various language to prevent the soliciting of new union members on company property. It is the opinion of the Board that *any such restriction does not represent a very realistic approach to the problem, nor is it conducive to industrial harmony.* [Italics added.]

It is most natural that when a group of employees sit down together during the lunch hour or meet in the locker-room prior to going on duty or meet together at other

times and places, even though on company property, one topic of conversation is likely to be the activities of the union. To provide that a union member shall be dismissed from employment or disciplined in some other way if he discusses union affairs with a non-union fellow employee while on company property tends only to drive such activities underground and fosters suspicion, distrust, and devices of subterfuge.

The non-union member, in turn, is entitled to protection from coercion and threats on the part of union members who may seek to impose upon him union discussions to which he does not care to listen. But in a free society neither he nor the company is entitled to a ruling that denies union members the right to discuss union affairs and the benefits of membership in the union with employees during leisure-time periods, provided that they do so in a legitimate and proper manner. However, management is entitled to insist that no so-called union activity be carried on within its plant while men are at work. It is that principle which the Board protects in its directive order on union activity.

The War Labor Board has consistently applied these principles in all of the cases which have come before it.[23]

[23] See *In re Marlin-Rockwell Corp.*, Cases Nos. 754 and 757, 12 L. R. R. 309, 310; *Matter of Dwight Mfg. Co.*, Case No. 111-2527-D, 14 L. R. R. 813; *In re Allied Chemical & Dye Corp.*, Case No. 636, 12 L. R. R. 215. In the single case upon which petitioner relies to prove (Br., pp. 22–23) that the

2. *The employer's interest.*—While the enforcement of rules prohibiting solicitation on non-working time is, as petitioner concedes (Brief, pp. 20, 23), normally detrimental to the exercise of the right of self-organization, the Board has repeatedly found, both before and after its decision in the *Peyton Packing* case, that their abrogation cannot and will not, in the normal case, appreciably affect efficiency, plant discipline or other legitimate employer interests.[24] The Board is therefore entirely justified in concluding, as the court below held (R. 713), that unless in a par-

War Labor Board has acted inconsistently, the Board did not pass on the propriety of such a provision. It merely directed that a contract to be executed between the company and the union should not "make reference to the company's statement of policy" issued five years earlier, to which the union had then agreed and which included a clause prohibiting union activity on the company's property. *Matter of J. I. Case Co.*, N. W. L. B. Case No. 130, 10 L. R. R. Man. 1057, 1059. It is to this statement of policy attached to the War Labor Board's opinion as Appendix A, and rejected by the War Labor Board as a basis for relations between the parties, that petitioner seemingly refers.

[24] See for example, *Matter of Letz Mfg. Co.*, 32 N. L. R. B. 563, 569; *Matter of L. C. Smith & Corona Typewriters, Inc.*, 11 N. L. R. B. 1382, 1391; *Matter of William Davies Co.*, 37 N. L. R. B. 631, 636–639, enforced, 135 F. (2d) 179 (C. C. A. 7), certiorari denied, 320 U. S. 770; *Matter of United States Cartridge Co.*, 47 N. L. R. B. 896, 905–906; *Matter of Denver Tent & Awning Co.*, 47 N. L. R. B. 586, 592–593, enforced, 138 F. (2d) 410 (C. C. A. 10); *Matter of Carter Carburetor Co.*, 48 N. L. R. B. 354, 355, enforced, 140 F. (2d) 714 (C. C. A. 8); *Matter of Piedmont Shirt Co.*, 49 N. L. R. B. 313, 317, 318, enforced, 138 F. (2d) 738 (C. C. A. 4); *Matter of Scullin Steel Co.*, 49 N. L. R. B. 405, 409–412.

ticular case an employer can show that "special circumstances make the rule necessary in order to maintain production or discipline," protection of the employees' statutory interests requires abrogation of the rule.

The Board recognizes that because of peculiar circumstances which may exist in an individual plant or type of business enterprise union solicitation might adversely affect production. In *Matter of Monarch Co.*, 56 N. L. R. B. 1749, the Board refused to pass upon the validity of a "no-solicitation" rule because the Trial Examiner had erroneously excluded evidence in the form of testimony by a competent witness that union solicitation within the plant had caused a decline in production. Had such evidence been admitted the Board would have considered whether, under all the circumstances, effectuation of the policies of the Act required imposition of such detriment upon the employer. The case of *Nash Kelvinator Corp.*, 18 N. L. R. B. 738, 741–744, cited by petitioner (Br., p. 22), aptly illustrates the point. In that case the Board found that a rule prohibiting solicitation at all times on the company's premises was not violative of the Act because it had been adopted "during a period of industrial strife * * * after union activity on the respondent's time and property had seriously disrupted production operations, had flouted plant discipline, and was threatening further discord."

But, as the Board held in *Matter of Scullin Steel Co.*, 49 N. L. R. B. 405, 409–412, a mere showing that union solicitation or discussion has resulted in occasional and isolated instances of disorderly conduct which did not interfere with production, is not sufficient to justify a rule prohibiting orderly solicitation or discussion on non-working time. The Board there said (49 N. L. R. B. at 411–412):

> 'It is neither necessary nor reasonably calculated to insure plant discipline that employees be required to refrain from orderly union discussion and activity when they are on plant property on their own time. * * * While, * * * an employer may * * * promulgate and enforce nondiscriminatory reasonable rules designed to maintain plant discipline, and to that extent limit the exercise of the employees' statutory rights, he may not further encroach upon these rights by outlawing union activity under circumstances which present no clear and convincing expectancy that such activity will affect discipline of employees in the performance of their work.'

This is not to say that an employer may not preserve plant discipline by punishing indulgence in words or conduct, whether in the course of solicitation or at any other time, which are "plainly likely to cause a breach of the peace by the addressee." *Chaplinsky* v. *New Hampshire*,

315 U. S. 568, 573. But we do say that if "no clear and present danger of * * * breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute" (*Thornhill* v. *Alabama*, 310 U. S. 88, 105), certainly no such dangers can be thought to be inherent in the activities of every union adherent who approaches a non-union fellow worker and attempts to persuade the latter to join a union. And a contrary conclusion cannot be justified by proof that solicitation may on occasion have given rise to a "trivial rough incident" or "a moment of animal exuberance." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 293, 295. Were this not true communication by working men as to matters of vital concern to them and to the public would be subject to prohibition by the states as well as by employers.

Illustrative of the Board's careful appraisal of situations in which legitimate employer interests might possibly be adversely affected by union solicitation on non-working time is the *Marshall Field* case, 34 N. L. R. B. 1, 10, also cited by petitioner (Br., p. 22). In that case the Board took cognizance of the peculiarities inherent in the operation of a retail department store and held that an employer could properly prohibit union solicitation of employees who "are constantly engaged in serving the public." Recently

in *Matter of Famous Barr Co.*, 59 N. L. R. B., No. 188, the Board again had occasion to note that union solicitation on the selling floor of a department store "might conceivably be disruptive of * * * business", and held that although the employer could not prohibit employees from engaging in solicitation before and after work and during luncheon and rest periods at places in the store where customers were not allowed, the employer could properly prohibit union solicitation on the selling floor at all times.[25]

It is evident therefore that petitioner's assertion (Br., p. 13), that the Board does not "consider the impact of [permitting solicitation during non-working time] upon that safety and efficiency in production in which the public and the employer alike have a vital interest", is simply not true. The Board's intense concern with the effect of union solicitation on production as evidenced in its decision in *Matter of Piedmont Shirt Co.*, 49 N. L. R. B. 313, 318, enforced, 138 F. (2d) 738 (C. C. A. 4). In that case the Board took pains to point out that its decision holding an

[25] Recognition that peculiar circumstances exist in particular types of business enterprises which indicate that unrestrained union activities during non-working time might adversely affect production and that in such cases, therefore, limitations upon such activities may be appropriate is shown by the decision of the National War Labor Board in *In re American Telephone & Telegraph Co.*, N. W. L. B. Case No. 111-5908-D, 15 L. R. R. 463-464, noted by petitioner (Br., p. 23, n. 23).

employer's prohibition of union activities unlawful was not to be construed to mean "that an employer may not enforce *reasonable* rules forbidding union activities, merely because they were less stringently enforced in the past. This is especially so in these times of grave national emergency when it is essential that the employees exert every effort to obtain maximum production." (Italics added.) Compare *Matter of Tabin-Picker Co.*, 50 N. L. R. B. 928, discussed in our brief in the *LeTourneau* case, pp. 17–18.

B. Application of the Board's policy to this case

The Board considered the particular circumstances of the instant case in the light of its general policy (R. 689). It first examined the extent to which enforcement of petitioner's no-solicitation rule would deprive employees of opportunities for self-organization. The Board found "that many of [petitioner's] employees live long distances from [its] plant and that their homes are scattered over a wide area" (R. 638). It further found that in plants like petitioner's "where transportation is particularly limited through gas rationing * * * and workers come from a radius of anywhere from 10 to 50 miles to work * * * the shop would be the natural place for workers to talk to one another and persuade one another to join the Union" (R. 638). This conclusion is buttressed by the fact that, as the Board noted "most if not all of the employees eat their

lunch at the plant" (R. 638). Therefore, to quote from the Board's findings (R. 638), "Under the conditions obtaining in January 1943, the [petitioner's] employees working long hours in a plant engaged in war production and expanding with extreme rapidity, were entirely deprived [by the no-solicitation rule] of their normal right to 'full freedom of association' in the plant on their own time, the very time and place, uniquely appropriate and almost solely available to them therefor."

After pointing out that enforcement of the no-solicitation rule under these circumstances would render virtually nugatory any attempt by petitioner's employees to exercise the rights guaranteed them by the statute, the Board turned to a consideration of the possible detriment to the employer's legitimate interests that would flow from abrogation of the rule as applied to the employees' non-working time. In this connection it declared that "the record discloses no special circumstances, and the [petitioner] advances no cogent reason, warranting the extension of the prohibition [of solicitation] to nonworking time, when production and efficiency could not normally be affected by union activity" (R. 689).

Petitioner seeks to justify its rule, in large part, as a solution of problems which would be fully met by a rule which did not apply to union solicitation (Br., p. 13). Petitioner explains the no-solicitation rule as a measure designed to avoid

"The great number and endless variety of potential demands upon the employees' time and money" made "by solicitors for a host of organizations and causes—many of them eminently deserving others of questionable or even fraudulent character" (Br., pp. 3, 13). But the Board's order requires that petitioner's rule be rescinded only "insofar as it prohibits union activity and solicitation on company property during the employees' own time" (R. 679). The rule, as modified, will still be effective to curb the evils of unbridled solicitation which petitioner fears. The matter of unionization, unlike many of the causes solicitation for which is included within petitioner's ban, is intimately related to the employment situation and is therefore indigenous to the plant premises. Upon this subject the rule impinges with peculiar force. As the Board found, petitioner can and does offer to other causes a substitute within the plant for the personal solicitation which it prohibits (R. 634–635). Petitioner's plant newspaper, public address system, personnel office, and other facilities can be and are made available to the Red Cross and similar organizations with complete propriety (R. 28–31, 36–37, 46–49, 52–58, 63–64, 82, 192–194, 203, 466). But the grant of such facilities to a union would constitute illegal support under the Act both because of their pecuniary value and because it would give to the union the very appearance of official management approval which petitioner, in

another connection, is so anxious to avoid (Br., pp. 29, 30–31). Hence, the net effect of petitioner's rule is to prohibit, in the case of labor organizations alone, all solicitation within the plant.

Insofar as petitioner's reasons for its rule apply specifically to union activities, they are posited not upon alleged conditions peculiar to petitioner's plant, but upon an argumentative hypothesis, applicable, if at all, to industry generally. Petitioner introduced no evidence that there was any friction between its employees, or any other evidence that would give color to an assertion that union solicitation in its plant might interfere with production or result in disturbing incidents. Stone and Katz both solicited extensively in the plant without any friction resulting (R. 66, 82–83, 90–94, 140–141). Petitioner, instead, baldly contends that, as a universal proposition, at least in unorganized plants, solicitation outside of working hours results in "disharmony and friction among the employees" and should therefore be banned (Br., pp. 23–25). But this argument, like the similar argument of respondent in the *LeTourneau* case (cf. Brief for the Board in the *LeTourneau* case, pp. 30–32), proves too much. It would serve equally well to justify a prohibition of union solicitation at any time, even off the employer's premises. For what this argument really amounts to is that an employer should be permitted to ban the "results" (Br., p. 24) of

any union solicitation, that is, the creation of differences of opinion among the employees about joining a union or remaining aloof. The avoidance of such results would ban union activities completely.

Moreover, petitioner's contention that the creation of such differences of opinion has an adverse effect on production is directly contrary to the experience of the Board and the War Labor Board. The insubstantiality of petitioner's fears that union solicitation permitted during non-working hours would interfere with production becomes apparent in the light of its admission that it found no need to bar full and free employee *discussion* as distinguished from solicitation, on any subject, including unionization, on non-working time (Br., p. 4). Kress, assistant to petitioner's president, for example, assured the union employees that the plant was not a "penitentiary" and that they could "talk" about the Union even during working time (R. 122, 556, 559, 560, 563). But the very dictum upon which petitioner relies to establish that the "results" of union solicitation would impede production (Br., pp. 23–24) attributes precisely the same detrimental effect on production to union discussion on non-working time.[26] If, as petitioner in effect concedes, union

[26] "Solicitation, *argument, the hurling of epithets in tense discussion* before work has been commenced or in the noon hour, may reasonably be expected to carry a certain animus over into work hours." [Italics added.] *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. (2d) 800, 805 (C. C. A. 6).

discussion even during working time imposes no "inconvenience, risk or damage"[27] upon it, it is difficult to understand how union solicitation during non-working time could do so.

Petitioner's attempt to distinguish between "solicitation" and "discussion" (R. 556) highlights the lack of realism inherent in its approach to this entire problem. Any remarks about a union addressed by a union adherent to another employee could be construed as an effort to persuade the latter to become a union member and hence as an act of solicitation. Cf. Brief on behalf of Petitioner in *R. J. Thomas* v. *Collins*, No. 14, this Term. Indeed, Factory Manager Lasker, contrary to the position petitioner has taken in this case (Br., p. 4), construed the rule against solicitation to mean that "you can't talk about the union" (R. 642; 118–119, 160–161).[28] A verbal formula so meaningless can afford no solution to the basic question.[29]

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[27] *National Labor Relations Board* v. *Cities Service Oil Co.*, 122 F. (2d) 149, 152 (C. C. A. 2).

[28] Katz testified that he asked Lasker the following hypothetical question (R. 118–119, 160–161): "I said, 'Supposing I am sitting eating my lunch, during the lunch hour, and a friend of mine comes over to me and says, "Hello, Bob, how is the union going?", What am I supposed to say to him, according to company rules'" To which Lasker replied, "'You are supposed to say,' he said, 'I am sorry, I can't speak to you. We are on company property. Please see me outside company property, before we can * * * discuss the union.'"

[29] Rules banning union solicitation during working hours only are commonly incorporated in union contracts and their enforcement is not difficult. United States Department of

In sustaining the Board, the court below held that the Board could properly weigh "what in fact will be the prejudice to the interests of the employer in allowing electioneering to go on during lunch hours, and what will be the benefit to the employees; and what will be his benefit and their prejudice in disallowing it" (R. 712). The court further held that the Board is empowered in the first instance to determine "whether the benefit shall prevail over the prejudice or vice versa" (R. 712), and that "only in cases where [the reviewing courts] believe that there is no reasonable warrant for the priority actually

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Labor, Division of Labor Standards, Bull. No. 686 (1942), *Union Agreement Provisions*, pp. 31, 243, but see also p. 294; Lieberman, Elias, *The Collective Labor Agreement*, Harpers (1939), pp. 194–195; Levinson, Edward, *Labor on the March* (1938), pp. 167–168; Wechsler, James A., *Labor Baron* (1944), p. 65; *In re Waukesha Motor Co.*, N. W. L. B. Case No. 401, 12 L. R. R. 436; *In re Ohio Public Service Co.*, N. W. L. B. Case No. 169, 12 L. R. R. 176; *Contract between Bethlehem Steel Co. and C. I. O.*, 13 L. R. R. 646, 621; *In re Armstrong Brothers Tool Co.*, N. W. L. B. Case No. 32, 10 L. R. R. Man. 960, 961.

Following the principles enunciated in the *Peyton Packing* case and in the instant case the Board has recently held in *Matter of South Carolina Granite Co.*, 58 N. L. R. B., No. 264, that an employer who, over objection by the union, insisted upon incorporating in a collective agreement a provision prohibiting union activity on his premises at all times had thereby refused to bargain collectively and had violated Section 8 (5) of the Act since the employer made no showing of special circumstances which necessitated such a rule as a safeguard to production. Cf. *Richfield Oil Corp. v. National Labor Relations Board*, 143 F. (2d) 860 (C. C. A. 9), enforcing, 49 N. L. R. B. 593.

awarded" (R. 713) may the courts set aside the Board's determination. Since, as even Judge Swan's dissenting opinion conceded (R. 714), petitioner's rule is "of course an impediment" to the exercise of the rights guaranteed under the Act, and since petitioner did not establish that it would suffer any detriment whatever from abrogation of the rule, the court below properly concluded that the Board's award of "priority" to the statutory interests of the employees was not without warrant (R. 713). Certainly in the absence of any evidence which would tend to show that the particular factory and factory grounds here involved were not "natural and proper places for the dissemination of information and opinion" concerning labor organizations, it could make no difference, even if it were true, that the employees might be able to carry on organizational activities elsewhere. The Act as well as the Constitution demands that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 163.

As we have stated in our brief in the *LeTourneau* case (pp. 36–39), unlike the court below and the Circuit Court of Appeals for the Ninth Circuit,[30] the Circuit Court of Appeals for the Fifth, Sixth, Eighth and Tenth Circuits in cases involv-

[30] See *Richfield Oil Corp.* v. *National Labor Relations Board*, 143 F. (2d) 860, 861–862 (C. C. A. 9).

ing the validity of no-solicitation rules fail to accord any weight whatever to the Board's construction of the statute and, since they exclude as irrelevant the competing considerations which the Board deems controlling, they completely disregard the Board's determination of which competing interest should prevail. For the reasons therein set forth, as petitioner evidently concedes (Br. pp. 11–12), we submit that the principles applied by these courts are erroneous and unsound.

Petitioner argues that the Board did not consider the facts as to the relative importance to the employees and to the employer of the no-solicitation rule (Br., p. 13), and refers to a statement of the court below (R. 713) which seems to assume that the Board made no specific findings on this point. The findings to which we have previously referred appear in the trial examiner's report (R. 638–639), which was adopted by the Board in its decision (R. 674); the court below apparently overlooked the significance of the report. The findings, as adopted, which are summarized *supra*, pp. 2–10, 32–37, do not rely merely upon general conclusions of policy, but show the injury to the employees' statutory rights which will result from enforcement of the no-solicitation rule and the absence of any proof of compensating benefit to the employer. The supporting evidence consists of the rule itself, which shows on its face that it does interfere with the employees' right to

organize, and in addition evidence indicating that in this case such activities would be severely hampered if they could not take place in the plant; detriment to the employees' rights was thus plainly shown. In so far as solicitation during non-working hours is concerned, which would normally not affect the employer's business, such evidence establishes a *prima facie* case which will stand unless the employer adduces testimony showing some special need for the rule in his plant. It is not incumbent on the Board to disprove the existence of such special circumstances before the employer has sought to establish their existence.

Here, as the court below held, the employer was afforded full opportunity at the hearing to introduce evidence tending to show what benefit accrued to him from enforcement of the rule and what detriment would flow from its abrogation, but failed to do so. Under these circumstances, petitioner's reliance upon this Court's decision in *Eastern-Central Assn. v. United States*, 321 U. S. 194 (Br., pp. 17–18) is misplaced. In that case, as the opinion makes clear (321 U. S. at 201–203), the cause was remanded to the Commission because the Commission, in formulating its policy, had in effect excluded from consideration a factor (competition) which the statute required it to take into account. The Board's policy, as we have demonstrated above, was formulated with due regard for all relevant factors, including those stressed by petitioner, and conforms to the statu-

tory standards. It is therefore subject to none of the defects to which this Court referred in the *Eastern* case.

II

The Board properly found that petitioner's prohibition of the wearing of union "steward" buttons in the plant interfered with the exercise of rights guaranteed in Section 7 and violated Section 8 (1) of the Act

It is undisputed that petitioner discharged employees Katz, Bobrow and Kahler as a penalty for wearing union steward buttons in the plant. If the employees were entitled to engage in such activities their discharge for doing so was clearly unlawful.

The Board, in its decision, pointed out that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity" (R. 676). Mr. Lloyd K. Garrison, in an opinion rendered on July 11, 1941, accompanying an arbitration award said:

> The wearing of a [union] button is a traditional and customary incident of membership in a bona fide labor organization—a sort of visible receipt for dues * * *.
>
> It seems to me that if a man has a right to be a member of a union, he has a right to those things which traditionally go with membership— * * * to wear his button * * *.[31]

[31] *In re Arbitration between Allis-Chalmers Mfg. Co.* and *United Automobile Workers (C. I. O.)*, 9 L. R. R. Man. 836–837.

Petitioner apparently concedes (Br., pp. 5-6, 28), that Section 7 of the Act protects the right of employees to wear buttons indicating their membership in a labor organization, within a plant as elsewhere.[32] This protection extends, as petitioner admits (Br., pp. 28, 30), to buttons indicating an employee's rank or position in a labor organization. In *Matter of Armour & Co.*, 8 N. L. R. B. 1100, 1111–1112, the Board held that a steward was a union officer who "was entitled to wear [a] button indicating his rank and function in the labor organization," and that the employer's order "directing a removal of the button constituted an interference with the rights guaranteed in Section 7 of the Act."[33] The Board followed this ruling in the instant case.

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[32] See Levinson, Edward, *Labor on the March* (1938), p. 167: "The right to talk during one's lunch hour and to wear the insignia of one's organization seems an obvious enough privilege in a free country."

[33] Accord: *Matter of Karp Metal Products Co.*, 42 N. L. R. B. 119, 138–139, 141, enforced *sub silentio*, on this point, 134 F. (2d) 954 (C. C. A. 2); *Matter of National Container Corp.*, 57 N. L. R. B., No. 102. Rosenfarb, Joseph, *The National Labor Policy and How It Works* (1940), comments as follows (p. 158): "If union activity, such as solicitation of members, which is not in derogation of discipline and efficiency can be carried on on the company premises, a fortiori the carrying of union insignia. This is particularly true of the union steward, who is the union representative in the plant. His functioning in the plant, if not disturbing to the proper carrying on of work, is part of the employee's right of self-organization."

Petitioner does not challenge the proposition that a shop steward, like any other officer, is entitled to wear a button indicating his rank and position in the union. But petitioner posits its entire case on this issue on the contention that the existence of union shop stewards in a plant inevitably implies that the labor organization has been accorded recognition by management (Br., p. 29, 30).

Petitioner's contention that since it had not recognized the union the wearing of shop steward buttons by its employees constituted "misrepresentation", depends entirely for its validity upon proof that the office of shop steward cannot and does not exist except where a labor organization has been accorded recognition by an employer. This, petitioner does not even attempt to establish. Petitioner merely asserts that the "characteristic" function of a shop steward "is that of dealing with management on behalf of the employees he represents" and that "This characteristic function can, of course, attach to his office only when it has been accorded some form of management recognition" (Br., p. 30). But the available evidence convincingly demonstrates that the functions and status of a shop steward depend on the organization in which he functions, the stage of development of the organization, the nature of relations between the organization and the management in each situation; and that stewards often function

before a union has been accorded recognition, in which case they are, of course, not regarded as management recognized representatives at all.

In 1921, before the advent of industrial unionism and collective bargaining in the mass production industries, a shop steward was characterized as "a worker's official who looks after the local union's interests in a particular shop or establishment" and "collects the union dues of members."[34] With the development of large scale union organization in the mass production industries, union stewards continued to function in two capacities; that is, as representatives of the employees in bargaining with the management once bargaining relationships had been established, and as "union wheel horses or 'spark plugs' in the plant"[35] both before and after the institution of collective bargaining in the plant. The documents relied on by petitioner itself (Br., pp. 40–45)[36] emphasize that after union recognition the dues collecting and other organizational aspects of the

[34] Browne, Waldo, *What's What in the Labor Movement* (1921), p. 434.

[35] Brooks, Robert R. R., *As Steel Goes* (1940), p. 209.

[36] These are United States Department of Labor, Division of Labor Standards, Bull. No. 59 (1943), *Preparing a Steward's Manual;* United Automobile Workers, C. I. O., International Education Committee, *How to Win for the Union—A Handbook for UAW-CIO Stewards and Committeemen*, 6th ed. (February 1943); Textile Workers Union of America, C. I. O., *So You're a Steward. A Handbook for TWUA Stewards and Department Committees* (New York 1943).

steward's job are equal in importance to the representation aspects. And there is certainly no reason why a union should not select its stewards at an early stage in the organizational process and have them perform the organizing functions which the job entails.

That stewards play a distinct and important role in union organization during the pre-recognition stage is evidenced by the testimony of the stewards in the instant case. Bobrow testified that after he was appointed steward he began to supervise the recruiting efforts of other union members, "I told them to the best of my knowledge where new members could be enrolled, and where possible helped members of the union enroll these people" (R. 214–217; see also 102, 156, 175–176). As an example of his activities in this respect Bobrow testified that if a union member in his department spoke to a fellow worker "trying to encourage him to join the union," he would ask Bobrow to accompany him, "believing that perhaps I might be able to clarify that particular worker on any objections or any points which were not clear to him regarding the union" (*id*). The wearing of a steward's button serves to identify the responsible and informed union leaders in the various departments to whom union members can turn for assistance in persuading others to join and from whom non-members can receive authoritative answers to questions concerning the union. That the appointment of stewards and

their wearing of steward buttons is thus a legitimate and significant aid to self organization, is therefore not open to question.

In practice, the selection of stewards before collective bargaining relationships have been established is a common phenomenon, as the cases before the Board show.[37] Illustrative also is the

[37] *Triplex Screw Co.* v. *National Labor Relations Board*, 117 F. (2d) 858, 861 (C. C. A. 6) (cases of *Koberna* and *Graczyk*); *National Labor Relations Board* v. *William Davies Co.*, 135 F. (2d) 179, 181–182 (C. C. A. 7), certiorari denied, 320 U. S. 770 (cases of *McNally* and *Canning*); *National Labor Relations Board* v. *Karp Metal Products Co.*, 134 F. (2d) 954 (C. C. A. 2), enforcing *sub silentio*, 42 N. L. R. B. 119, 138–139 (entire group of union stewards); *Matter of Armour & Co.*, 8 N. L. R. B. 1100, 1110 (case of *Davis*); *Matter of National Container Corp.*, 57 N. L. R. B., No. 102 (cases of *Valentine*, *Cianci*, *Kinstler* and *Landsberg*); *Matter of Mt. Clemens Pottery Co.*, 46 N. L. R. B. 714, 746 (case of *Felong*.).

The practice of selecting shop stewards early in the union's organizing campaign was discussed by William Green in his testimony in *Alabama State Federation of Labor* v. *McAdory*, 18 So. (2d) 810 (Ala.), certiorari granted, November 25, 1944, No. 588, this Term. He there stated (R. 253–254): "Both prior to and after the receipt of the charter, but before the local union has become recognized as the exclusive bargaining representative for all the employees in the plant or in the craft in the plant, the members of the union as a group select, from time to time, individuals, groups or committees (the members of which are known as 'Shop Committeemen' or 'Shop Stewards'), comprised of employees of the plant and of the local and national representatives of the international union and of the A. F. of L., to present to the employer in regular meetings the views, requests, problems and grievances of the members. These representatives so selected by the members of the union are usually chosen by way of departments or smaller units thereof within the plant. They meet with the representatives of the management regularly

following news item, headed "North American Votes CIO in Key N. L. R. B. Poll" in *United Automobile Worker*, March 15, 1943, p. 8:

> Livingston, who spent several weeks here, in active charge of the drive declared that the unceasing, all-ours (sic)-of-the-day-and-night-work of a number of persons made the UAW-CIO victory possible. In addition to the officers, rank and file, *shop stewards* and committee members from the plant who are members of Local 645, UAW-CIO, those who worked on the drive are * * *" [Italics added.]

In those cases, as in this case, to use petitioner's phrase (Br., p. 30) "the employees involved were obviously not stewards in [the] sense" of being management recognized spokesmen for the Union. The primary function of the stewards at the Republic plant prior to recognition, was, as the stewards themselves repeatedly testified, to lead the organizing activities of the Union, generally in the plant, and particularly in their own depart-

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in the endeavor through negotiation, bargaining, solicitation and persuasion, to obtain from the employer adjustment of grievances and obtain from the employer certain rights, privileges and benefits on behalf of the members and thereby improve the working conditions of the employees thus represented. Frequently, such negotiations result in the establishment of formal grievance machinery. For the benefit of representatives of the union who present the grievances, the Educational Department of the international union issues pamphlets to all of these representatives and to all members of the union."

ments (R. 66, 102–103, 154–156, 168, 171–173, 175, 191, 214–217). Katz testified that when Kress asked him what the duties of a steward were, during his conversation with him on January 22 (*supra*, pp. 6–7), he told him that "he was mainly to help build up a Union *at this particular stage*" (R. 122; italics supplied). Katz also testified that he gave a similar version of his duties to employees to whom he talked (R. 156). The stewards also understood, however, that "if there was any possibility of taking up grievances, [they] would do so, if [they] were allowed to do so, if [they] could get some results from the management" (R. 156, 219–220, 557, 561). Katz told the employees that he "was ready if any grievances came up to talk about them *if* [*he*] *was able* to do something" (R. 103; italics supplied). Since the Union was at this time attempting to persuade petitioner to permit it to handle grievances (R. 195, 179–180, 609–610), it was natural and entirely permissible for it to select and start the training of stewards in anticipation of achieving the desired agreement.

Under these circumstances the Board was clearly correct in finding as it did (R. 675) that the wearing of a union steward button is not "a representation that the employer either approves or recognizes the union in question as the representative of the employees."[38] And the court below

[38] Compare the Board's finding in *Matter of National Container Corp.*, 57 N. L. R. B., No. 102, that the wearing of a

properly rejected petitioner's unsubstantiated attack upon that finding which, as the court pointed out, "is preeminently one for those versed in trade union lore" (R. 714). Clearly, therefore, there is no basis for petitioner's repeated characterizations of the Union's action in instructing its stewards to wear buttons indicating their rank as "misrepresentation" (Br., pp. 29, 30).

Even assuming, however, that the employees might have shared petitioner's erroneous understanding of the usual meaning of the term "steward," there is no reason whatever to assume that they would have concluded, from the single fact that "Steward" buttons were worn in the plant, that the management had accorded any kind of recognition to the Union. As the Board noted (R. 647), "to so assume constitutes an unwarranted traducement of their awareness and intelligence." As Bobrow told Kress during the conference on January 26 (*supra*, p. 8) "the workers knew only too well that this was not a union shop" (R. 192). At the very time this question came up, the Union was announcing in a leaflet that "UAW-CIO SEEKS GRIEVANCE SET-UP FOR RACERS" (R. 178, 621). The leaflet reproduced a letter of January 7, 1943, addressed to

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steward button indicates nothing more than "the rank and function of the wearer in [the union], regardless of whether the organization represents a minority or a majority of the employees."

petitioner, in which the Union requested the establishment of a grievance procedure (R. 179–180, 609; see also R. 107, 189, 195, 561). Certainly, therefore, the Union was not misleading the employees. Neither was the management. Its position on the handling of grievances was perfectly clear (R. 545–546, 569, 578; see also R. 192).

Here petitioner admittedly permits its employees to wear other union buttons (Br., p. 5, 28), and it offers no explanation of the distinction which it makes between the two kinds of buttons, other than its erroneous assertion as to the meaning of the term "steward." Since, therefore, there was in fact no reason to believe that the wearing of steward buttons would confuse the employees, it is not surprising that petitioner, as the Board noted (R. 675–676) produced no employee who suffered from any delusion as to the management's position. As the court below properly held (R. 714), petitioner's failure to buttress its speculative apprehensions by presenting evidence that any employee was misled, or that any employee had attempted to present grievances through a representative, adequately supports the Board's conclusion that the wearing of steward buttons would give rise to no danger to any legitimate employer interest.

Petitioner's novel contention that it was required to take preventive measures because of its

duty under the Act to remain neutral (Br. 5, 30–31) falls with its untenable assertion that the wearing of steward buttons would mislead the employees concerning the management's attitude toward the Union. If, in fact, petitioner feared that its position with respect to the handling of grievances might be obscured by the fact that a few employees were wearing "Steward" buttons (a fear which the Board found to be without foundation) (R. 675–676), clarification required no more than a simple statement to the employees such as was sent to the Union on January 20 (R. 615–616, 180).

Petitioner attempts to strengthen its justification of the steward button rule by asserting that the employees who were chosen to act as stewards in its plant were to perform functions "which did not differ materially from their previous function as members of the organizing committee" (Br. p. 29). But the allocation of functions among and between offices in the Union is not a legitimate concern of the management. It does not rest with petitioner to decide whether employees who hold office in a union perform services commensurate with their titles. Petitioner's attempt to interfere in this matter underscores the illegal character of its restraint on the employees' activities.

We submit that the Board properly concluded that since petitioner failed to establish that it would suffer any detriment whatever as a result

of the wearing of steward buttons in the plant, its prohibition of this legitimate form of union activity constituted illegal interference within the meaning of Section 8 (1) of the Act (R. 676).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

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JANUARY 1945.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

SEC. 1.

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor

organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

* * * * *

SEC. 10.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

SUPREME COURT OF THE UNITED STATES.

Nos. 226 and 452.—October Term, 1944.

Republic Aviation Corporation, Petitioner, vs. National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
226	
National Labor Relations Board, Petitioner, vs. Le Tourneau Company of Georgia.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
452	

[April 23, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

In the *Republic Aviation Corporation* case, the employer, a large and rapidly growing military aircraft manufacturer, adopted, well before any union activity at the plant, a general rule against soliciting which read as follows:

"Soliciting of any type cannot be permitted in the factory or offices."

The Republic plant was located in a built-up section of Suffolk County, New York. An employee persisted after being warned of the rule in soliciting union membership in the plant by passing out application cards to employees on his own time during lunch periods. The employee was discharged for infraction of the rule and, as the National Labor Relations Board found, without discrimination on the part of the employer toward union activity.

Three other employees were discharged for wearing UAW-CIO union steward buttons in the plant after being requested to remove the insignia. The union was at that time active in seeking to organize the plant. The reason which the employer gave for the request was that as the union was not then the duly designated representative of the employees, the wearing of the steward buttons in the plant indicated an acknowledgment by the management of the authority of the stewards to represent the employees in dealing with the management and might impinge upon the employer's policy of strict neutrality in union matters and might interfere with the existing grievance system of the corporation.

The Board was of the view that wearing union steward buttons by employees did not carry any implication of recognition of that union by the employer where, as here, there was no competing labor organization in the plant. The discharges of the stewards, however, were found not to be motivated by opposition to the particular union, or we deduce, to unionism.

The Board determined that the promulgation and enforcement of the "no solicitation" rule violated Section 8(1) of the National Labor Relations Act as it interfered with, restrained and coerced employees in their rights under Section 7 and discriminated against the discharged employee under Section 8(3).[1] It determined also that the discharge of the stewards violated Section 8(1) and 8(3). As a consequence of its conclusions as to the solicitation and the wearing of the insignia, the Board entered the usual cease and desist order and directed the reinstatement of the discharged employees with back pay and also the rescission of "the rule against solicitation in so far as it prohibits union activity and solicitation on company property during the employees' own time." 51 N. L. R. B. 1186, 1189. The Circuit Court of Appeals for the Second Circuit affirmed, 142 F. 2d 193, and we granted certiorari, 323 U. S. —, because of conflict with the decisions of other circuits.[2]

In the case of *Le Tourneau Company of Georgia*, two employees were suspended two days each for distributing union literature or circulars on the employees' own time on company owned and policed parking lots, adjacent to the company's fenced-in plant, in violation of a long standing and strictly enforced rule, adopted prior to union organization activity about the premises, which read as follows:

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[1] 49 Stat. 449, 452:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"SEC. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . . ."

[2] Midland Steel Products Co. v. N. L. R. B., 113 F. 2d 800; N. L. R. B. v. Williamson-Dickie Mfg. Co., 130 F. 2d 260, 267; Boeing Airplane Co. v. N. L. R. B., 140 F. 2d 423; Le Tourneau Co. of Georgia v. N. L. R. B., 143 F. 2d 67.

"In the future no Merchants, Concern, Company or Individual or Individuals will be permitted to distribute, post or otherwise circulate handbills or posters, or any literature of any description on Company property without first securing permission from the Personnel Department."

The rule was adopted to control littering and petty pilfering from parked autos by distributors. The Board determined that there was no union bias or discrimination by the company in enforcing the rule.

The company's plant for the manufacture of earth moving machinery and other products for the war is in the country on a six thousand acre tract. The plant is bisected by one public road and built along another. There is one hundred feet of company-owned land for parking or other use between the highways and the employee entrances to the fenced enclosures where the work is done, so that contact on public ways or on non-company property with employees at or about the establishment is limited to those employees, less than 800 out of 2100, who are likely to walk across the public highway near the plant on their way to work, or to those employees who will stop their private automobiles, buses or other conveyances on the public roads for communications. The employees' dwellings are widely scattered.

The Board found that the application of the rule to the distribution of union literature by the employees on company property which resulted in the lay-offs was an unfair labor practice under Section 8(1) and 8(3). Cease and desist, and rule rescission orders, with directions to pay the employees for their lost time, followed. 54 N. L. R. B. 1253. The Circuit Court of Appeals for the Fifth Circuit reversed the Board, 143 F. 2d 67, and we granted certiorari because of conflict with the *Republic* case, 323 U. S. —.

These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a "rigid scheme of remedies" is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194. So far as we are here concerned that purpose is the right of employees to organize for mutual aid without employer interference. This is the principle of labor relations which the Board is to foster.

The gravamen of the objection of both *Republic* and *Le Tourneau* to the Board's orders is that they rest on a policy formulated without due administrative procedure. To be more specific it is that the Board cannot substitute its knowledge of industrial relations for substantive evidence. The contention is that there must be evidence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization in the circumstances and situation of each company. Neither in the *Republic* nor the *Le Tourneau* cases can it properly be said that there was evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union members. Neither of these is like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or be seriously handicapped.[3]

The National Labor Relations Act creates a system for the organization of labor with emphasis on collective bargaining by employees with employers in regard to labor relations which affect commerce. An essential part of that system is the provision for the prevention of unfair labor practices by the employer which might interfere with the guaranteed rights. The method for prevention of unfair labor practices is for the Board to hold a hearing on a complaint which has been duly served upon the employer

[3] See Sixth Annual Report, National Labor Relations Board, pp. 43, 44; Re Harlan Fuel Co. et al., 8 N. L. R. B. 25, 28, 63; Re West Kentucky Coal Co., et al., 10 N. L. R. B., 88, 105-6, 133; Re Weyerhaeuser Timber Co., et al., 31 N. L. R. B. 258, 262, 267, 270; cf. Labor Board v. Waterman S. S. Co., 309 U. S. 206, 224.

who is charged with an unfair labor practice. At that hearing the employer has the right to file an answer and to give testimony. This testimony, together with that given in support of the complaint, must be reduced to writing and filed with the Board. The Board upon that testimony is directed to make findings of fact and dismiss the complaint or enter appropriate orders to prevent in whole or in part the unfair practices which have been charged. Upon the record so made as to testimony and issues, courts are empowered to enforce, modify or set aside the Board's orders,[4] subject to the limitation that the findings of the Board as to facts, if supported by evidence, are conclusive.

Plainly this statutory plan for an adversary proceeding requires that the Board's orders on complaints of unfair labor practices be based upon evidence which is placed before the Board by witnesses who are subject to cross-examination by opposing parties.[5] Such procedure strengthens assurance of fairness by requiring findings on known evidence. *Ohio Bell Tel. Co.* v. *Comm'n*, 301 U. S. 292, 302; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 288. Such a requirement does not go beyond the necessity for the production of evidential facts, however, and compel evidence as to the results which may flow from such facts. *Market St. Ry. Co.* v. *Railroad Com'n of California, et al.*; Nos. 510-511, this Term, slip opinion p. 8. An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 479; *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 130.

In the *Republic Aviation Corporation* case the evidence showed that the petitioner was in early 1943 a non-urban manufacturing

[4] Labor Board v. Jones & Laughlin, 301 U. S. 1; 49 Stat. 449, 452-455, §§ 7 to 10 inclusive.

[5] This is not a statutory administrative hearing to reach a basis for action akin to legislation. See Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 304-319.

establishment for military production which employed thousands. It was growing rapidly. Trains and automobiles gathered daily many employees for the plant from an area on Long Island, certainly larger than walking distance. The rule against solicitation was introduced in evidence and the circumstances of its violation by the dismissed employee after warning was detailed.

As to the employees who were discharged for wearing the buttons of a union steward, the evidence showed in addition the discussion in regard to their right to wear the insignia when the union had not been recognized by the petitioner as the representative of the employees. Petitioner looked upon a steward as a union representative for the adjustment of grievances with the management after employer recognition of the stewards' union. Until such recognition petitioner felt that it would violate its neutrality in labor organization if it permitted the display of a steward button by an employee. From its point of view, such display represented to other employees that the union already was recognized.

No evidence was offered that any unusual conditions existed in labor relations, the plant location or otherwise to support any contention that conditions at this plant differed from those occurring normally at any other large establishment.

The Le Tourneau Company of Georgia case also is barren of special circumstances. The evidence which was introduced tends to prove the simple facts heretofore set out as to the circumstances surrounding the discharge of the two employees for distributing union circulars.

These were the facts upon which the Board reached its conclusions as to unfair labor practices. The Intermediate Report in the *Republic Aviation* case, 51 N. L. R. B. at 1195, set out the reason why the rule against solicitation was considered inimical to the right of organization.[8] This was approved by the Board. *Id.*, 1186. The Board's reasons for concluding that the petitioner's insistence that its employees refrain from wearing steward buttons

[8] 51 N. L. R. B. 1195:

"Thus, under the conditions obtaining in January 1943, the respondent's employees, working long hours in a plant engaged entirely in war production and expanding with extreme rapidity, were entirely deprived of their normal right to 'full freedom of association' in the plant on their own time, the very time and place uniquely appropriate and almost solely available to them therefor. The respondent's rule is therefore in clear derogation of the rights of its employees guaranteed by the Act."

appear at page 1187 of the report.[7] In the *Le Tourneau Company* case the discussion of the reasons underlying the findings was much more extended. 54 N. L. R. B. 1253, 1258, *et seq.* We insert in the note below a quotation which shows the character of the Board's opinion.[8] Furthermore, in both opinions of the Board full citation of authorities was given including *Matter of Peyton Packing Company*, 49 N. L. R. B. 828, 50 N. L. R. B. 355, hereinafter referred to.[9]

The Board has fairly, we think, explicated in these cases the theory which moved it to its conclusions in these cases. The excerpts from its opinions just quoted show this. The reasons why it has decided as it has are sufficiently set forth. We cannot agree, as Republic urges, that in these present cases reviewing courts are left to "sheer acceptance" of the Board's conclusions or that its formulation of policy is "cryptic." See *Eastern Central Motor Carriers Ass'n* v. *United States*, 321 U. S. 194, 209.

Not only has the Board in these cases sufficiently expressed the theory upon which it concludes that rules against solicitation or prohibitions against the wearing of insignia must fall as inter-

[7] We quote an illustrative portion, 51 N. L. R. B. 1187-88: "We do not believe that the wearing of a steward button is a representation that the employer either approves or recognizes the union in question, as the representative of the employees, especially when, as here, there is no competing labor organization in the plant. Furthermore, there is no evidence in the record herein that the respondent's employees so understood the steward buttons or that the appearance of union stewards in the plant affected the normal operation of the respondent's grievance procedure. On the other hand, the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent's curtailment of that right is clearly violative of the Act."

[8] 54 N. L. R. B. at 1259-60: "As the Circuit Court of Appeals for the Second Circuit has held, 'It is not every interference with property rights that is within the Fifth Amendment and . . . Inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining.' The Board has frequently applied this principle in decisions involving varying sets of circumstances, where it has held that the employer's right to control his property does not permit him to deny access to his property to persons whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining, and in those decisions which have reached the courts, the Board's position has been sustained. Similarly, the Board has held that, while it was 'within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours,' it was 'not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property,' the latter restriction being deemed an unreasonable impediment to the exercise of the right to self-organization."

[9] 51 N. L. R. B. 1186, 1187, at note 1 and 54 N. L. R. B. 1253, 1260, at notes 6 and 7.

ferences with union organization but in so far as rules against solicitation are concerned, it had theretofore succinctly expressed the requirements of proof which it considered appropriate to outweigh or overcome the presumption as to rules against solicitation. In the *Peyton Packing Company* case, 49 N. L. R. B. 828, at 843, hereinbefore referred to, the presumption adopted by the Board is set forth.[10]

Although this definite ruling appeared in the Board's decisions, no motion was made in the court by Republic or Le Tourneau after the Board's decisions for leave to introduce additional evidence to show unusual circumstances involving their plants or for other purposes.[11] Such a motion might have been granted by the Board or court in view of the fact that the Intermediate Report in the *Republic Aviation* case was dated May 21, 1943, and that in *Le Tourneau* November 11, 1943, while the opinion in the *Peyton Packing Company* case was given as late as May 18, 1943. We perceive no error in the Board's adoption of this presumption.[12] The Board had previously considered similar rules in industrial establishments and the definitive form which the *Peyton Packing Company* decision gave to the presumption was the product of the Board's appraisal of normal conditions about indus-

[10] 49 N. L. R. B. at 843-44: "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline."

[11] 49 Stat. 454-55, Sec. 10(e):

"... If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. ..."

[12] Compare National Labor Relations Board v. Regal Knitwear Co., 140 F. 2d 746, affirmed on another ground, Regal Knitwear Co. v. Labor Board, No. 86, this Term, decided January 29, 1945; Crichton v. United States, 56 F. Supp. 876, 880.

trial establishments.[13] Like a statutory presumption or one established by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred.[14]

In the *Republic Aviation* case, petitioner urges that irrespective of the validity of the rule against solicitation, its application in this instance did not violate Section 8(3), note 1, *supra*, because the rule was not discriminatorily applied against union solicitation but was impartially enforced against all solicitors. It seems clear, however that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of Section 8(3) in that it discourages membership in a labor organization.

Republic Aviation Corporation v. *National Labor Relations Board* is affirmed.

National Labor Relations Board v. *Le Tourneau Company of Georgia* is reversed.

Mr. Justice ROBERTS dissents in each case.

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[13] Re Denver Tent and Awning Co., 47 N. L. R. B. 586, 588; Re United States Cartridge Co., et al., 47 N. L. R. B. 896, 897; Re Carter Carburetor Corp., 48 N. L. R. B. 354, 356; Re Scullin Steel Co., 49 N. L. R. B. 495, 411. See also for comparison the later cases of Re Dallas Tank & Welding Co., Inc., 51 N. L. R. B. 1315; Re Johnson-Stephens & Shinkle Shoe Co., 54 N. L. R. B. 189, 192.

[14] Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 43; Western & Atlantic R. Co. v. Henderson, 279 U. S. 639, 642; Helvering v. Rankin, 295 U. S. 123, 129. Compare Tot v. United States, 319 U. S. 463.